

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of)	
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CERTAIN FLOORING PRODUCTS)	Inv. No. 337-TA-443
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**NOTICE OF COMMISSION DECISIONS TO REVIEW PORTIONS OF A FINAL
INITIAL DETERMINATION AND TO EXTEND BY 30 DAYS THE TARGET DATE FOR
COMPLETION OF THE INVESTIGATION; SCHEDULE FOR WRITTEN
SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY, THE PUBLIC
INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to grant Roysol's motion to join the November 30, 2001, motion to strike and alternative motion to reply of Unilin and Pergo; to grant complainants' motion to respond to the November 30, 2001, motion of Unilin and Pergo; to grant Unilin and Pergo's motion to reply; to deny Unilin and Pergo's motion to strike; to extend the target date for completion of the investigation by 30 days to March 7, 2002; and to review portions of a final initial determination (ID) of the presiding administrative law judge (ALJ) finding no violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Clara Kuehn, Esq., or David Wilson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3012 and (202) 708-2310, respectively. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>).

Copies of the public version of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000.

SUPPLEMENTARY INFORMATION:

The Commission ordered the institution of this investigation on December 27, 2000, based on a complaint filed on behalf of Alloc, Inc., Racine, Wisconsin; Berry Finance N.V., Oostrozebeke, Belgium; and Vålinge Aluminum AB, Viken, Sweden (collectively “complainants”). 66 *Fed. Reg.* 1155 (2001). The notice of investigation was published in the *Federal Register* on January 5, 2001. *Id.* The complaint, as supplemented, alleged violations of section 337 in the importation, the sale for importation, and the sale within the United States after importation of certain flooring products by reason of infringement of claims 1-3, 5-6, 8-12, 14-15, 17-36, and 38-41 of U.S. Letters Patent 5,860,267 (“the ‘267 patent”) and claims 1-14 of U.S. Letters Patent 6,023,907 (“the ‘907 patent”). *Id.* The Commission named seven respondents: Unilin Décor N.V., Wielsbeke, Belgium; BHK of America, Inc., Central Valley, NY; Meister-Leisten Schulte GmbH, Rütten, Germany (collectively, Unilin); Pergo, Inc., Raleigh, NC (“Pergo”); Akzenta Paneel + Profile GmbH, Kaisersesch, Germany (“Akzenta”); Tarkett, Inc., Whitehall, PA; and Roysol, Saint-Florentin, France (“Roysol”).

On March 5, 2001, the ALJ issued an ID (ALJ Order No. 8) granting complainants’ motion to amend the complaint and notice of investigation to add allegations of infringement of claims 1, 8, 13-14, 21, 26-27, 34, 39-41, and 48 of U.S. Letters Patent 6,182,410 (“the ‘410 patent”). On July 10, 2001, the ALJ issued an ID (ALJ Order No. 26) granting complainants’ motion for summary determination on the economic prong of the domestic industry requirement. Those IDs were not reviewed by the Commission. An evidentiary hearing was held from July 26, 2001, through August 1, 2001. The ALJ heard closing arguments on October 16, 2001. On October 19, 2001, the ALJ issued an ID (ALJ Order No. 30) granting complainants’ unopposed motion to terminate the investigation with respect to claims 1-3, 5-6, 8-12, 14-15, 17-18, 20-22, 24-36, 38, and 40-41 of the ‘267 patent; claims 4-14 of the ‘907 patent; and claims 8, 13-14, 21, 27, 34, and 40 of the ‘410 patent. On October 25, 2001, the ALJ issued an ID (ALJ Order No. 31) terminating the investigation as to respondent Tarkett, Inc. Those IDs were not reviewed by the Commission. The only asserted claims remaining in the investigation are claims 19, 23, and 39 of the ‘267 patent, claims 1-3 of the ‘907 patent, and claims 1, 26, 39, 41, and 48 of the ‘410 patent.

The ALJ issued his final ID on November 2, 2001, concluding that there was no violation of section 337, based on the following findings: (a) complainants have not established that any of the asserted claims are infringed by any of the respondents; (b) respondents have failed to establish that the asserted claims of each of the ‘267, ‘907, and ‘410 patents are not valid; (c) no domestic industry exists that exploits any of the ‘267, ‘907, and ‘410 patents; and (d) it has not been established that complainants misused any of the patents in issue. The ALJ also made recommendations regarding remedy and bonding in the event the Commission concludes there is a violation of section 337.

On November 15, 2001, complainants and the Commission investigative attorney (“IA”) petitioned for review of the ID. On November 23, 2001, respondents Unilin, Pergo, Roysol, and Akzenta, and complainants filed responses to the petitions for review. On November 30, 2001, Unilin and Pergo moved to strike portions of complainants' response of November 23, 2001, and in the alternative moved for leave to reply to complainants' response. On December 4, 2001, Respondent Roysol moved to join the motion to strike. On December 10, 2001, complainants responded to the motion to strike. The Commission has determined to grant Roysol's motion to join, to grant Unilin and Pergo's motion to reply and complainants' motion to respond, and to deny the motion to strike.

Having examined the record in this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review:

- (1) the ID's construction of the asserted claims of the '410 patent;
- (2) the ID's construction of the asserted claims of the '267 and '907 patents, except not to review the ID's construction of those claims apart from 35 U.S.C. § 112, ¶ 6;
- (3) the ID's infringement conclusions with respect to the '410, '267, and '907 patents, except not to review the ID's conclusions that (a) the asserted claims of the '267 and '907 patents are not infringed when those claims are construed apart from 35 U.S.C. § 112, ¶ 6 and (b) complainants have not established that there are no substantial noninfringing uses for the accused products and hence there is no contributory infringement;
- (4) the ID's validity conclusions with respect to the '267, '410, and '907 patents, except not to review the ID's validity conclusions when the asserted claims of the '267 and '907 patents are construed apart from 35 U.S.C. § 112, ¶ 6;
- (5) the ID's conclusions with respect to the technical prong of the domestic industry requirement with respect to the '410, '267, and '907 patents, except not to review the ID's conclusions that complainants have failed to establish the technical prong of the domestic industry requirement when the asserted claims of the '267 and '907 patents are construed apart from 35 U.S.C. § 112, ¶ 6.

The Commission has also determined to review the procedural question of whether complainants waived the issue of whether the accused products infringe the asserted claims of the patents in controversy to the extent that the asserted claims are construed under 35 U.S.C. § 112, ¶ 6 to cover equivalents of the structure disclosed in the specification, *viz.*, equivalents of a mechanical joint with play, by failing to raise the issue before the ALJ.

The Commission has determined not to review the remainder of the ID, including the ID's conclusions with respect to patent misuse.

On review, the Commission requests briefing based on the evidentiary record on all issues under review and is particularly interested in receiving answers to the following questions, with all answers cited to the evidentiary record. For purposes of focusing the briefing, the questions present tentative resolution of some claim construction issues (*e.g.*, applicability of 35 U.S.C. § 112, ¶ 6 and identification of claimed functions associated with means-plus-function limitations).

1. Have complainants waived the issue of whether, if the asserted claims of the '907, '267, or '410 patents are construed under 35 U.S.C. § 112, ¶ 6 to require “play,” flooring panels without play are “equivalent” for purposes of § 112, ¶ 6 to flooring panels with “play” by failing to raise the issue before the ALJ?
2. Assuming for purposes of this question that 35 U.S.C. § 112, ¶ 6 applies to the limitation “the two panels are . . . mechanically locked to each other in a second direction, that is at right angles to said first direction and to the adjacent joint edges, as a result of a first locking member disposed at one of the adjacent edges being connected to a second locking member disposed at the other one of the adjacent edges, and . . . being displaceable in relation to each other in the direction of the adjacent joint edges” in claim 1 of the '907 patent (and dependent claims 2 and 3), and that the function of the “first locking member” and “second locking member” is that when the locking members are connected, “the two panels are . . . mechanically locked to each other” in the horizontal direction at right angles to the adjacent joint edges and the two panels are “displaceable in relation to each other in the direction of the adjacent joint edges”:

What are the corresponding structure(s) disclosed in the specification that perform the function identified above?

Construing the limitation under 35 U.S.C. § 112, ¶ 6 using the above-stated function and the corresponding structure(s) that you identified, please answer the following questions: (In your response, please address the 35 U.S.C. § 112, ¶ 6 equivalents to the corresponding structures)

- (a) Do respondents infringe any of the three claims?
 - (b) Are the claims invalid?
 - (c) Do complainants meet the technical prong of the domestic industry requirement as to claims 1, 2, or 3?
3. Assuming that 35 U.S.C. § 112, ¶ 6 applies to the “locking means” of claim 1 of the '410 patent, and that the function of the claimed “locking means” is (a) “forming a first mechanical connection for locking said adjacent edges to each other in a vertical direction,” (b) “forming a second mechanical connection for locking said adjacent edges to each other in a horizontal direction at right angles to said edges,” (c) “operat[ing] as a one-way snap lock in said horizontal direction,” and (d) “enabl[ing] said adjacent panels,” when connected by the first and second connections, to be rotated “so as to move the locking element out of the locking groove in order to unlock said one-way snap lock”:

What are the corresponding structure(s) disclosed in the specification that perform the function identified above?

Construing the limitation under 35 U.S.C. § 112, ¶ 6 using the above-stated function and the corresponding structure(s) that you identified, please answer the following questions: (In your response, please address the 35 U.S.C. § 112, ¶ 6 equivalents to the corresponding structures)

- (a) Do respondents' products infringe claim 1?
 - (b) Is claim 1 invalid?
 - (c) Do complainants meet the technical prong of the domestic industry requirement as

to claim 1?

4. Assuming for purposes of this question that 35 U.S.C. § 112, ¶ 6 applies to the “locking means” of claim 26 of the '410 patent, and that the function of the claimed “locking means” is (a) “releasably locking,” (b) “forming a first mechanical connection for locking said adjacent first edges to each other in a vertical direction,” (c) “forming a second mechanical connection for locking said adjacent short edges to each other in a horizontal direction at right angles to said first edges,” and (d) “operat[ing] as a one-way snap lock in said horizontal direction”:

What are the corresponding structure(s) disclosed in the specification that perform the function identified above?

Construing the limitation under 35 U.S.C. § 112, ¶ 6 using the above-stated function and the corresponding structure(s) that you identified, please answer the following questions: (In your response, please address the 35 U.S.C. § 112, ¶ 6 equivalents to the corresponding structures)

- (a) Do respondents' products infringe claim 26?
- (b) Is claim 26 invalid?
- (c) Do complainants meet the technical prong of the domestic industry requirement as to claim 26?

5. Assuming for purposes of this question that 35 U.S.C. § 112, ¶ 6 applies to the “*means for mechanically locking . . .*” limitation of claim 39 of the '410 patent:

What is the function recited in claim 39 for this means?

What are the corresponding structure(s) disclosed in the specification that perform the function?

Are there other means-plus-function limitations in claim 39? If so, for each limitation identify the recited function and corresponding structure(s) disclosed in the specification that perform the function.

Construing the limitation under 35 U.S.C. § 112, ¶ 6 using the function(s) and the corresponding structure(s) that you identified, please answer the following questions: (In your response, please address the 35 U.S.C. § 112, ¶ 6 equivalents to the corresponding structures)

Do respondents' products infringe claim 39?

Is claim 39 invalid?

Please repeat the above analysis for dependent claims 41 and 48.

Do complainants meet the technical prong of the domestic industry requirement as to claim 39?

6. Assuming for purposes of this question that 35 U.S.C. § 112, ¶ 6 does not apply to the “*means for mechanically locking . . .*” limitation of claim 39 or to any other means-plus-function limitations that you identified for this claim in the previous question:

How should claims 39, 41, and 48 be construed?

So construed, do respondents' products infringe claims 39, 41, or 48?

So construed, are claims 39, 41, or 48 invalid?

So construed, do complainants meet the technical prong of the domestic industry requirement as to claim 39?

7. Have complainants established that respondents possessed specific intent to encourage another's

infringement, *i.e.*, have complainants shown (1) that each respondent's actions induced infringing acts and (2) that each respondent knew or should have known his actions would induce actual infringements?

Each party is requested to provide citations to the record for evidentiary support. *E.g.*, In particular a citation is requested for the following exhibits referenced in the parties' petitions for review and responses: the June 21, 2000, opinion letter from Akzenta and Tarkett's counsel (IA's petition at 29) and Roysol's patent and flooring panels (Roysol's response at 16).

In connection with the final disposition of this investigation, the Commission may issue (1) an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if , that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry that either are adversely affecting it or are likely to do so. For background information, see the Commission Opinion, *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount to be determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submission should be concise and thoroughly referenced to the record in this investigation, including references to exhibits and testimony. Additionally, the parties to the investigation, interested government agencies, and any other interested persons are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the ALJ's November 2, 2001, recommended determination on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. The written submissions and proposed remedial orders must be filed no later than the close of business on January 10, 2002. Reply submissions must be filed no later than the close of business on January 17, 2002. No further submissions will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original and 14 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R § 201.6. Documents for which confidential treatment is granted by the Commission will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42 - .45 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42 - .45).

By order of the Commission.

Donna R. Koehnke
Secretary

Issued: December 20, 2001